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In The
Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL PARK TROT, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASSOCIATION, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The Illinois Supreme Court

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a State's expropriation of money from private parties is wholly outside the scope of the Takings Clause.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its creation in 1977, MSLF has represented parties before this Court seeking to preserve the Constitution's equal protection guarantees. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). MSLF has also participated as an amicus

[1] Pursuant to Supreme Court Rule 37.2, letters indicating MSLF's intent to file this amicus curiae brief were received by counsel of record for all parties at least 10 days prior to the due date of this brief. The parties have consented to the filing of this brief. Finally, pursuant to Supreme Court Rule 37.6, MSLF affirms that no counsel for a party authored this brief in whole or in part and that no party, person, or entity made a monetary contribution specifically for the preparation or submission of this brief.

curiae to ensure that the Fifth Amendment is properly interpreted so as to secure the sanctity of property rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *Wilkie v. Robbins*, ___ U.S. ___, 127 S.Ct. 2588 (2007).

In the instant case, the Illinois Supreme Court, relying on the concurring and dissenting opinions in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), created a per se rule that a State's expropriation of money can never be the subject of a taking. If this decision is allowed to stand, it will entice other States to take money from one disfavored constituency and simply give it to one that is more powerful. Because hundreds of MSLF's members are in the mining, oil and gas, livestock, and timber industries, they may next feel the wrath of a state legislature that simply desires to take money from them and give it to the industry du jour. Therefore, MSLF respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case involves a constitutional challenge to an Illinois statute that requires Petitioners to transfer 3 percent of their adjusted gross receipts ("AGR") to Illinois horse-racing tracks for the apparent purpose of improving the financial health of the

Illinois horse-racing industry. Petitioners' Appendix 1a. Nine riverboat casinos are currently licensed and operating in Illinois. *Id.* 1a-2a. Five casinos are located in the central or southern portions of Illinois, and the other four operate near Chicago. *Id.* Petitioners own the four Chicago-area casinos. *Id.* 4a.

There are five Illinois tracks that feature live horse racing. *Id.* 1a-2a. On-track betting at these tracks purportedly declined after the Riverboat Gambling Act and the horse-racing industry blamed riverboat gambling. *Id.* 2a-3a. In an apparent response to the horse-racing industry's complaints, in May 2006 the Illinois General Assembly passed Public Act 94-804 (the "Act"). *See id.* 2a-3a. The Act requires those casinos with AGR of more than $200 million to contribute 3 percent of their AGR to the Horse Racing Equity Trust Fund on a daily basis. *Id.* 2a. The casinos with AGR of more than $200 million are the four Chicago-area casinos owned by Petitioners. *Id.* 1a-4a.

The Act further provides that the money (together with interest earned thereon) be distributed from the Fund as follows: sixty percent of the proceeds is distributed to tracks as purses and the remaining forty percent of the proceeds is distributed directly to the tracks as an operating subsidy. *Id.* 2a. Because the Act gives the racetracks almost carte blanche as to how the forty percent of the subsidy may be used in their businesses, *id.*, this portion of the subsidy may go straight to the tracks' bottom lines.

Shortly after the Act became law, Petitioners filed this suit in Illinois state court challenging the Act's constitutionality. *Id.* 4a. Petitioners alleged, *inter alia*, that the 3 percent surcharge is an unconstitutional taking because it forces them to subsidize their competitors. *See id.* 4a-5a. After the Illinois trial court struck down the Act on state law grounds, Respondents appealed directly to the Illinois Supreme Court challenging the trial court's state-law ruling. *Id.* 5a-6a. Petitioners, on the other hand, defended the lower court's decision and reasserted their contention that the Act violates the federal Takings Clause because it takes money from them and gives it to their competitors. *Id.* 20a-26a. The Illinois Supreme Court, however, reversed the trial court's state-law ruling and rejected Petitioners' federal takings argument. *Empress Casino Joilet Corp. v. Giannoulias*, 896 N.E.2d 277, 290-93 (Ill. 2008).

On the takings question, the Illinois Supreme Court declared: "the takings clause[ ] . . . appl[ies] only to the state's exercise of eminent domain and not to the state's power of taxation." *Id.* at 291. The court also opined that "the same principle applies to fees, whether for certain service or licensing." *Id.* In reaching its conclusion, the Illinois Supreme Court relied on the concurring and dissenting opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Aggregating the votes from the concurring and dissenting opinions, the Illinois Supreme Court reasoned that a five-member majority of the Court "rejected the theory

that an obligation to pay money constitutes a taking." *Empress Casino*, 896 N.E.2d at 292; *id.* at 293 ("five Justices of the Supreme Court in [*Eastern Enterprises*] reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings"). In short, the Illinois Supreme Court announced a per se rule that money can never be the subject of a taking.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION CREATED BY THE FRAGMENTED DECISION IN *EASTERN ENTERPRISES*.

A. The Differing Opinions In *Eastern Enterprises*.

In *Eastern Enterprises*, this Court addressed the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722. 524 U.S. at 503-504. The Coal Act required companies that had been in the coal mining business to contribute to a fund that provided health care benefits to retired coal miners. *Id.* at 504-515. As to the petitioner, Eastern Enterprises, the Coal Act mandated that Eastern Enterprises pay health care benefits for persons it had employed between 1946 and 1965, the year it stopped participating in the coal mining business. *Id.* at 516-517. Specifically, Eastern was ordered to pay insurance premiums for more

than 1,000 retired miners who had worked for the company before 1966, with the premiums for a 12-month period exceeding $5 million. *Id.* at 517. Eastern asserted, *inter alia*, that the Coal Act constituted an unconstitutional taking of its property. *Id.*

The plurality opinion applied a Takings Clause analysis to the monetary liabilities imposed by the Coal Act. *Id.* at 522-537. The plurality began by noting that the aim of the Takings Clause is to "'prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 522 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Although the plurality acknowledged that takings claims usually arise when the government physically invades real property, it also recognized that "economic regulation such as the Coal Act may nonetheless effect a taking." *Id.* at 523 (citing *United States v. Security Industrial Bank*, 459 U.S. 70, 78 (1982). In fact, the plurality quoted *Calder v. Bull*, 3 Wall. 386, 388 (1798), for the basic principle embodied in the Takings Clause that the government may not enact "'a law that takes *property* from A. and gives it to B.'" *Eastern Enterprises*, 524 U.S. at 523 (emphasis in original). The plurality then applied the well-known *Penn Central* three-part regulatory takings analysis and concluded that the Coal Act's allocation scheme, as applied to Eastern, constituted a taking. *Id.* at 530-537.

The four dissenters rejected the possibility that "an ordinary liability to pay money" could ever constitute a taking. *Id.* at 554-557 (Breyer, J., dissenting). Instead, they believed the Coal Act's imposition of liability on Eastern Enterprises should be analyzed under substantive due process:

> [T]here is no need to torture the Takings Clause to fit this case. The question involved – the potential unfairness of retroactive liability – finds a natural home in the Due Process Clause, a Fifth Amendment neighbor. That Clause . . . safeguards citizens from arbitrary or irrational legislation. And the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law that is basically arbitrary.

Id. at 556-557. Surprisingly, the four dissenters concluded that the substantial retroactive liability imposed upon Eastern Enterprises was neither arbitrary nor irrational. *Id.* at 559-567.

The concurring opinion also rejected the plurality's conclusion that the Coal Act took property:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate

> upon or alter an identified property interest, and it is not applicable to or measured by a property interest.

Id. at 540 (Kennedy, J., concurring in the judgment and dissenting in part). Thus, the concurring opinion believed that a takings analysis was inapplicable because Eastern Enterprises' substantial monetary obligation to pay money was not tied to a "property interest." The concurring opinion did, however, determine that the Coal Act's extreme retroactive liability violated principles of substantive due process. *Id.* at 549-550.

B. The Lower Courts Are Confused Regarding How To Interpret The Differing Opinions In *Eastern Enterprises*.

Following the fragmented decision in *Eastern Enterprises*, the lower courts have grappled with how to deal with constitutional challenges to monetary obligations. Some courts have followed *Eastern Enterprises*' plurality opinion and applied a takings analysis. *Cent. States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 807-808 (7th Cir. 1999); *Small Property Owners of San Francisco v. City and County of San Francisco*, 47 Cal.Rptr.3d 121, 129 (Cal. Ct. App. 2006) (*Eastern Enterprises* did not "expressly rule" that a "regulation, although mandating only the payment of money, cannot be subject to a takings clause analysis."). For example, in *United States Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 414-

416 (2000), the Fifth Circuit analyzed a Louisiana state law requirement that insurers contribute money to a workers' compensation fund according to a formula based upon the insurers' volume of business in prior years. Following the same analysis as the plurality opinion in *Eastern Enterprises*, the Fifth Circuit held that the law constituted a regulatory taking. *Id.* at 416-420.

Other courts, including the Illinois Supreme Court in the instant case, have followed what has been characterized as the "second majority opinion" in *Eastern Enterprises*. Note, *The Death Of Nollan And Dolan? Challenging The Constitutionality Of Monetary Exactions In The Wake Of Lingle v. Chevron*, 87 B.U. L. Rev. 725, 750-751 (2007). These courts have aggregated the votes of the four dissenters and the concurrence to conclude that a majority of this Court in *Eastern Enterprises* rejected the theory that an obligation to pay money constitutes a taking.[2] *Empress Casino*, 896 N.E.2d at 292; *Gordon v. Norton*, 322 F.3d 1213, 1217-1218 (10th Cir. 2003) ("A majority of the [*Eastern Enterprises*] Court held that

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[2] This Court's "settled jurisprudence" is that, "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgmen[t] on the narrowest grounds.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 n.9 (1988) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)) (emphasis added). This "settled jurisprudence" is not a two-way street. Thus, dissenting and concurring votes cannot be aggregated to create a holding of this Court.

the Coal Act was unconstitutional. . . . A different majority, however, concluded that the Takings Clause was not implicated by the Coal Act. . . ."); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-1340 (Fed. Cir. 2001) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. . . . [W]e are obligated to follow the views of that majority."); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) (five justices in *Eastern Enterprises* rejected the conclusion that the Coal Act effectuated a taking); *Parella v. Retirement Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (following the "majority" in *Eastern Enterprises* and holding that Takings Clause did not apply because the case did "not involve tangible personal property or real property"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 674 (3d Cir. 1999) (In *Eastern Enterprises*, "[f]ive Justices . . . rejected the idea that a law that imposed only a financial burden without identifying a particular property right could ever constitute a taking.").

Another line of cases has held that no binding authority resulted from the fragmented decision in *Eastern Enterprises*. *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2nd Cir. 2003); *United States v. Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001); *Franklin County Convention Facilities Authority v. American Premier Underwriters, Inc.*, 240 F.3d 534, 552-553 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254-1255 (D.C.

Cir. 1998). Recently, in *Swisher International, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008), the Eleventh Circuit, purportedly "independently analyzed" whether an obligation to pay money may be subject to a takings claim. This analysis, however, was primarily based upon the "case law following *Eastern Enterprises*." *Id.* at 1056. Relying, in part, on the cases cited above that followed the "second majority opinion" from *Eastern Enterprises* the Eleventh Circuit ruled that an obligation to pay money cannot constitute a taking. *Id.* at 1056-1057.

C. This Court Regularly Grants Review To Resolve Confusion Among The Lower Courts.

This Court regularly grants review when the lower courts are confused regarding an important federal issue. *Grutter v. Bollinger*, 539 U.S. 306, 320-325 (2003) (granted review to clear up the confusion created by the fractured decision in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); *Marshall v. Marshall*, 547 U.S. 293, 305 (2006) (granted review to "resolve the apparent confusion among federal courts concerning the scope of the probate exception" to federal court jurisdiction); *Stewart v. Dutra Const. Co.*, 543 U.S. 481, (2005) (granted review to remedy confusion over how to determine whether a watercraft is a "vessel" for purposes of the Longshore and Harbor Workers' Compensation Act); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 669 (1982) (granted review to "resolve the confusion in the lower courts

respecting the impact of [*Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972)] on traditional rules for determining federal admiralty jurisdiction"). Because of the importance of the federal issue, this Court should grant review to resolve the confusion created by the fragmented decision in *Eastern Enterprises*.

II. THIS COURT SHOULD GRANT REVIEW BECAUSE THE ILLINOIS SUPREME COURT'S PER SE RULING, THAT AN OBLIGATION TO PAY MONEY CAN NEVER BE THE SUBJECT OF A TAKING, REDEFINES THE TERM "PROPERTY" TO EXCLUDE MONEY.

Based upon the purported "second majority opinion" in *Eastern Enterprises*, the Illinois Supreme Court ruled:

> The Act does not involve an interest in physical or intellectual property, nor does it operate upon or alter an identifiable property interest. The case at bar does not involve the state's exercise of its eminent domain powers, but rather involves its exercise of its taxing powers. . . . As such, a takings analysis is not applicable to plaintiffs' claim.

Empress Casino, 896 N.E. at 293. In effect, the Illinois Supreme Court created a per se rule that an obligation to pay money can never be the subject of a taking because there is no identifiable property interest involved. Review by this Court is needed

because this per se rule redefines the term "property" to exclude money.

A. "Property" Secures "Liberty."

The origin of property rights in America can be traced to the Magna Carta (1215). *See United States v. Lee*, 106 U.S. 196, 228 (1882). Chapter 29 of the Magna Carta provides: "[n]o freeman shall be taken or imprisoned, or disseised of his free tenement or of his liberties or free customs . . . unless by the lawful judgment of his peers, or by the law of the land." Thus, the Magna Carta secured the rights of property owners against deprivations by the government without due process of law. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 13 (2d ed., 1998). Importantly, the early American colonists believed the Magna Carta to be part of their birthright as English subjects. *Id.* For example, in 1687, William Penn advised the colonists "not to give away any thing of *Liberty* and *Property* that at present they do . . . enjoy." *Id.* (quoting William Penn, *The Excellent Privilege of Liberty and Property Being the Birth-Right of the Free-Born Subjects of England* (William Bradford 1687)) (emphasis in original).

In 1690, John Locke published his famous *Second Treatise of Government*, in which he opined that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property

rights. John Locke, *Second Treatise of Government*, §§ 123-131 (1690) (C.B. Macpherson ed., 1980). According to Locke, private property existed under natural law before the creation of governments. *Id.* §§ 25-51. Locke further believed that the major purpose of government was to protect private property. *Id.* § 124 ("The great and *chief end* therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*.) (emphasis in original). More importantly, Locke equated property with liberty. *Id.* § 123 (Men are "willing to join in society with others, who are already united, or have a mind to unite for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*.") (emphasis in original).

Evidently influenced by Locke, "colonial leaders viewed the security of property as the principal function of government." *The Guardian of Every Other Right* 28. In fact, Thomas Jefferson incorporated Locke's compact theory into the *Declaration of Independence*:

> WE hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.[3]

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[3] Although Jefferson substituted "Pursuit of Happiness" for "estates," this change should not be interpreted as lessening the

(Continued on following page)

The Framers of the Constitution also recognized that "principles of good government started with the protection of private property[.]" Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002). For example, utilizing the philosophy of Locke, John Rutledge of South Carolina told the delegates at the Philadelphia Convention that "[p]roperty was certainly the principal object of Society." *The Guardian of Every Other Right* 43 (quoting 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., 1937)). Alexander Hamilton stated "[o]ne great objt. of Govt. is personal protection and the security of Property." *Id.* (quoting 1 *The Records of the Federal Convention of 1787* 302). Thus, the Framers saw "property ownership as a buffer protecting individuals from government coercion." *Id.*

In 1790 John Adams declared: "[p]roperty must be secured or liberty cannot exist." *Id.* (quoting *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1851)). The next year, the Fifth Amendment became effective and expressly

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importance of property rights. In fact, "'the acquisition of property and the pursuit of happiness were so closely connected with each other in the minds of the founding generation that naming only one of the two sufficed to evoke both.'" *The Guardian of Every Other Right* 29 (quoting Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (University of North Carolina Press 1980).

incorporated into the Constitution Adams' belief that property is fundamental to liberty. As finally adopted:

> [T]he Fifth Amendment contains two important property guarantees, along with procedural safeguards governing criminal trials. The amendment provides in part that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Madison's decision to place this language next to criminal justice protections, such as the prohibitions against double jeopardy and self-incrimination, underscored the close association of property rights with personal liberty. *Individuals needed security against both arbitrary punishment and deprivation of property.*

The Guardian of Every Other Right 54 (emphasis added).

For over 200 years this Court has consistently recognized that private property is essential to a free society. In 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation." The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the

> common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-236 (1897) (citations omitted). Seventy-five years later, this Court again emphasized that private property was an essential component to liberty:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted). Accordingly, "[t]he right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *The Guardian of Every Other Right* 26

(quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (New York 1775)).

B. "Property" Includes Money.

It is beyond doubt that money is included within Locke's definition of "property." For example, Locke believed that:

> The *supreme power cannot take* from any man any part of his *property* without his own consent: for the preservation of property being the end of government, and that for which men enter into society . . .

Second Treatise of Government § 138 (both emphasis is original). This limitation on government applied even to the part of government that had the most power over man, *i.e.*, the military. *Id.* § 139. In fact, in explaining this principle, Locke expressly equated money with "property":

> [T]he preservation of the army, and in it of the whole common-wealth, requires an *absolute obedience* to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them: but yet we see, that neither the serjeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish, can command that soldier to give him one penny of his money; nor the *general*, that can condemn him to death for deserting his

> post, or for not obeying the most desperate orders, can yet with all his absolute power of life and death, dispose of one farthing of that soldier's estate, or seize one jot of his goods; whom yet he can command any thing, and hang for the least disobedience.

Id. (underlined emphasis added).

More importantly, Madison, the principal drafter of the Takings Clause, was of a like mind. In a 1792 essay, he wrote that that the term "property":

> [I]n its particular application, means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right, and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandise, or *money*, is called his property.

James Madison, *Property* (Mar. 27, 1792), available at http://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html (emphasis added). Madison then concluded that the "security of property" is jeopardized by "unequal," oppress[sive]," and "arbitrary" taxes:

> A just security to property is not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the

> poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities.

Id. Accordingly, the term "property" in the Takings Clause includes money. *See Legal Tender Cases*, 79 U.S. 457, 580 (1870) (Chase, C.J., dissenting) (noting that the Takings Clause was designed to prevent expropriation of property of the kind historically associated with the issuance of paper money).

C. This Court Has Recognized That "Property" Includes Money.

This Court has long recognized that "property" includes money and that a monetary obligation may trigger the Takings Clause. For example, in *Norwood v. Baker*, 172 U.S. 269 (1898), this Court analyzed a special assessment imposed against landowners abutting a new street. The landowners argued that the special assessment constituted a taking because the monetary obligation far exceeded any benefit they received from the new street. *Id.* at 270-275. Although this Court recognized the power of municipalities to make special assessments under their general taxing authority, *id.* at 277-278, it cautioned that this "power" "is not unlimited." *Id.* at 279. In fact, "[t]here

is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property." *Id.* Accordingly, this Court ruled: "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.*; *see Houck v. Little River Drainage District*, 239 U.S. 254, 275 (1915) (a taking claim may arise when the monetary "exaction is a flagrant abuse [of the taxing authority], and by reason of its arbitrary character is mere confiscation of particular property"); *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 24-25 (1916) (noting that when the monetary obligation "complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property[,]" it would rise to the level of a taking); *Dane v. Jackson*, 256 U.S. 589, 599 (1921) (A state tax law will be held to conflict with the Fourteenth Amendment when "it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation – 'to spoliation under the guise of exerting the power of taxing.'" (quoting *Bell's Gap R. Co. v. Pennsylvania*, 137 U.S. 232, 237 (1890)).

More recently, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this Court

struck down a Florida law that allowed a county court to expropriate the interest that was earned on the money held by the court during an interpleader action. In so doing, this Court ruled that the county's expropriation of the interest for its own use was analogous to the physical taking in *United States v. Causby*, 328 U.S. 256 (1946), where the government occupied air space over land, destroying its use as a chicken farm. *Id.* at 163-164; *accord*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (all nine members of this Court agreed that a state's expropriation of the interest earned on lawyer trust accounts constituted a per se physical taking).[4]

In short, this Court's precedent stands for the heretofore unremarkable proposition that the term "property" in the Takings Clause includes money. In the instant case, however, the Illinois Supreme Court redefined the term "property" so as to exclude money. This Court's review is necessary to correct the mistake made by the Illinois Supreme Court.

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[4] The primary disagreement between the members was how to value the property, *i.e.*, money, that was taken. Compare 538 U.S. at 235-240 with *id.* at 241-252 (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

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